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PAGE 01 STATE 203851
ORIGIN EUR-12

INFO OCT-01 ISO-00 CA-01 L-03 JUSE-00 CIAE-00 DODE-00
INR-10 NSAE-00 PA-01 ICA-11 SP-02 SS-15 NSC-05
CPR-03 TRSE-00 /064 R

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APPROVED BY EUR:RDVINE
EUR/CE: WMWOESSNER
CA/SCA:RDRY (INFO)
L/M:HSHAMWELL

-----058094 112141Z /73

P 112038Z AUG 78
FM SECSTATE WASHDC
TO AMEMBASSY BERLIN PRIORITY

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E.O. 11652: N/A

TAGS: CGEN, GE, US

SUBJECT: DISTRICT COURT RULES ARLINGTON COUNTY MAY SUE
GDR IN EMBASSY APARTMENT TAX CASE

REF: STATE A-2473

1. BEGIN SUMMARY. AT AUGUST 9 MEETING REQUESTED BY GDR
EMBASSY TO DISCUSS AUGUST 4 FEDERAL DISTRICT COURT RULING
THAT IT HAS JURISDICTION TO HEAR ARLINGTON COUNTY TAX SUIT
AGAINST GDR, DEPARTMENT LAWYER SHAMWELL EXPLAINED THAT
RULING DID NOT EXTEND TO SUBSTANTIVE MERITS OF CASE. JUDGE-
MENT AS TO MERITS, HE SAID, WOULD BE HEAVILY AFFECTED BY
NEW DEPARTMENT POLICY ON DIPLOMATIC TAX EXEMPTION. HE
PROMISED DECISION ON THAT POLICY "VERY SOON" AND FURTHER
PROMISED THAT, IF (FYI AS EXPECTED END FYI) IT IS FAVORABLE
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PAGE 02 STATE 203851

TO GDR, DEPARTMENT WOULD OFFER AMICUS CURIAE OPINION TO
COURT. SHAMWELL ALSO INFORMED GDR EMBASSY OFFICERS THAT
EMBASSY BERLIN WOULD SHORTLY SERVE PROCESS (REFAIR) ON MFA
AND EXPLAINED PURPOSE OF SAME. END SUMMARY

2. FEDERAL DISTRICT COURT IN ALEXANDRIA RULED AUGUST 4
THAT IT HAS JURISDICTION TO HEAR TAX SUIT CASE AGAINST

GDR BEING BROUGHT BY ARLINGTON COUNTY, VIRGINIA WITH REGARD TO EMBASSY STAFF HOUSING BUILDING IN ARLINGTON. BASING ITS CASE ON THE FOREIGN SOVEREIGNTIES IMMUNITIES ACT OF 1976 AND THE VIENNA CONVENTION ON DIPLOMATIC

RELATIONS, GDR HAD ARGUED THAT IT IS IMMUNE FROM TAXES, SINCE BUILDING IN QUESTION AT 1515 SOUTH ARLINGTON RIDGE ROAD HAS "BEEN USED EXCLUSIVELY FOR PURPOSES OF MAINTAINING HOUSING FOR THE DIPLOMATIC, ADMINISTRATIVE, TECHNICAL AND SERVICE STAFF OF THE EMBASSY OF THE GDR". ARLINGTON, HOWEVER, HAD ARGUED THAT THE VIENNA CONVENTION ONLY APPLIES TO CHANCERIES AND THE RESIDENCES OF AMBASSADORS AND THAT THE GDR OPERATES THE ARLINGTON APARTMENT BUILDING AS A "COMMERCIAL ACTIVITY", SINCE IT RENTS THE APARTMENTS THEREIN TO ITS STAFF. IN HIS RULING, JUDGE ALBERT BRYANT NOTED THAT "THE DISTRICT COURT HAS NO JURISDICTION OVER FOREIGN COUNTRIES EXCEPT IN COMMERCIAL CASES" BUT CONCLUDED THAT "THIS CASE MEETS THE COMMERCIAL ACTIVITY EXCEPTION".

3. THE RULING WAS THE SUBJECT OF AN AUGUST 5 WASHINGTON POST STORY ENTITLED "TAX SUIT AGAINST EAST GERMANY UPHELD". STORY BEING POUCHED.

4. DEFERRING TO POST ARTICLE GDR POLITICAL COUNSELOR SIEMENS REQUESTED AUGUST 9 APPOINTMENT FOR HIMSELF AND CONSULAR OFFICER GUNTHER TO DISCUSS CASE. DURING MEETING LIMITED OFFICIAL USE

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PAGE 03 STATE 203851

THAT DATE WITH WOESSNER AND GRAY, EUR/CE, AND SHAMWELL, L, SIEMENS ASKED WHERE CASE STOOD NOW AND WHAT FUTURE ALTERNATIVES WERE. SHAMWELL EXPLAINED THAT JUDGE BRYANT'S RULING PERTAINED ONLY TO JURISDICTION AND NOT TO MERITS OF CASE, WHICH BRYANT WOULD HAVE TO WEIGH AT INDETERMINATE FUTURE DATE. MEANWHILE, L HAD MOVED "5 OR 6 STEPS" CLOSER TO GENERAL POSITION ON DIPLOMATIC TAX EXEMPTION ISSUE THAT WOULD AFFECT SEVERAL CASES SIMILAR TO GDR'S. AS EXAMPLES OF OTHER CASES, SHAMWELL CITED CHILE, ARGENTINA AND CANADA BUT ADMITTED THAT GDR'S WAS FIRST SINCE 1976 PASSAGE OF FOREIGN SOVEREIGN IMMUNITIES ACT TO REACH COURTS.

5. NOTING THAT STATE DEPARTMENT HAD ACTED AS AMICUS CURIAE IN CASES PRIOR TO 1976 AND THAT COURTS NORMALLY ACCEPTED DEPARTMENT'S INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW AS DEFINITIVE, HE REAFFIRMED THAT DEPARTMENT HAD TOLD COURT THAT DEPARTMENT IS PREPARED TO ACT IN SUCH A FASHION IN THIS CASE. JUDGE BRYANT HAD NOT ASKED FOR SUCH HELP IN MAKING JURISDICTION DECISION BUT MAY WELL DO SO IN DELIBERATION ON SUBSTANTIVE MERITS. EVEN IF HE DOES NOT, SHAMWELL SAID, DEPARTMENT MAY VOLUNTEER ITS OPINION.

WHEN SIEMENS ASKED IF HE COULD REPORT DEPARTMENT'S INTENTION TO TESTIFY, SHAMWELL SAID HE WOULD ADVISE AGAINST A CATEGORICAL ASSURANCE, SINCE HE DOUBTED WHETHER SIEMENS WOULD WANT DEPARTMENT TO VOLUNTEER OPINION TO COURT, IF THAT OPINION WERE THAT THE GDR SHOULD PAY THE TAX. FYI

IT IS VERY UNLIKELY THAT DEPARTMENT WILL ADOPT SUCH A NEGATIVE POSITION. END FYI.

6. TURNING TO DETAILS OF JUDGE BRYANT'S AUGUST 4 DECISION, ABOUT WHICH HE CLAIMED TO HAVE NO DIRECT KNOWLEDGE, SIEMENS SAID THAT ASSERTION IN POST ARTICLE THAT EMBASSY RENTS APARTMENTS IS FALSE. NOTING THAT HE, TOO, HAD NO DIRECT KNOWLEDGE OF HOW AUGUST 4 DECISION WAS REACHED, LIMITED OFFICIAL USE

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PAGE 04 STATE 203851

SHAMWELL OPINED THAT, IF THAT IS THE CASE, THE COURT WAS WRONG AND THE GDR WOULD HAVE GROUNDS FOR APPEAL. HE WOULD, HOWEVER, LIKE TO CHECK WRITTEN SYNOPSIS OF DECISION AND WOULD BE IN TOUCH WITH COURT OR FAULKNER, THE GDR'S LAWYER, TO OBTAIN SAME. SHAMWELL FURTHER SAID THAT HE WAS SURPRISED TO READ THAT RULING WAS BASED ON COMMERCIAL ACTIVITY, AN ARGUMENT HE FOUND "CURIOUS" AND "NOVEL". IT WAS, HE ADDED, CERTAINLY NOT BASED ON ANY ADVICE FROM DEPARTMENT. ARLINGTON'S LAWYER, MOREOVER, HAD NEVER INDICATED AN INTEREST IN COMMERCIAL ANGLE BUT RATHER THAT HE WAS PROCEEDING ON BASIS OF ARGUMENT THAT GDR TAX EXEMPTION LACKED TREATY BASIS.

7. AS TO NEXT STEPS, SHAMWELL SAID HE WOULD ASCERTAIN FROM JUDGE BRYANT THE DATE FOR NEXT HEARING AND PROMISED SIEMENS AN ANSWER "VERY SOON" ON DEPARTMENT'S NEW POLICY ON DIPLOMATIC TAX EXEMPTION WHICH WOULD HAVE A DIRECT EFFECT ON CURRENT LITIGATION. HE ALSO EXPLAINED LEGAL REQUIREMENT TO SERVE PROCESS ON GDR (REFAIR) AND THAT NORMAL MEANS FOR DOING SO IS THROUGH AMERICAN EMBASSY TO MFA. AFTER PROCESS HAD BEEN SERVED, GDR WOULD HAVE 60 DAYS TO RESPOND TO COMPLAINT. TO OUR KNOWLEDGE, HE ADDED, EMBASSY BERLIN HAD NOT YET SERVED PROCESS. THE FACT THAT JUDGE BRYANT HAD ACTED BEFORE EXPIRATION OF 60 DAYS ALLOWED GDR WAS ANOTHER "CONFUSING" ASPECT OF CASE, SUGGESTING THAT PERHAPS JUDGE BRYANT'S RULING WAS ONLY DECLARATORY; I.E., A RULING THAT HE COULD RATHER THAN WOULD HEAR CASE. IN ANY EVENT, SHAMWELL SAID HE JUST WANTED GDR MFA TO BE ALERTED THAT SERVICE OF PROCESS WHICH EMBASSY BERLIN WOULD UNDERTAKE SHORTLY SHOULD NOT BE INTERPRETED AS A NEW OR UNUSUAL DEVELOPMENT IN THE CASE.

8. EMBASSY SHOULD NOW SERVE PROCESS (REFAIR) ON MFA, LIMITED OFFICIAL USE

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DRAWING UPON ABOVE AS NECESSARY. VANCE

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 jan 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: n/a
Control Number: n/a
Copy: SINGLE
Draft Date: 11 aug 1978
Decaption Date: 01 jan 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 20 Mar 2014
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1978STATE203851
Document Source: CORE
Document Unique ID: 00
Drafter: VGRAY:JKR
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Expiration:
Film Number: D780329-0613
Format: TEL
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1978/newtext/t19780872/aaaacjf.tel
Line Count: 176
Litigation Code IDs:
Litigation Codes:
Litigation History:
Locator: TEXT ON-LINE, ON MICROFILM
Message ID: 08d98264-c288-dd11-92da-001cc4696bcc
Office: ORIGIN EUR
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 4
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 78 STATE A-2473
Retention: 0
Review Action: RELEASED, APPROVED
Review Content Flags:
Review Date: 05 may 2005
Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: N/A
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 1764390
Secure: OPEN
Status: NATIVE
Subject: DISTRICT COURT RULES ARLINGTON COUNTY MAY SUE GDR IN EMBASSY APARTMENT TAX CASE
TAGS: CGEN, GC, US
To: BERLIN
Type: TE
vdkgvwkey: odb://SAS/SAS.dbo.SAS_Docs/08d98264-c288-dd11-92da-001cc4696bcc
Review Markings:
Sheryl P. Walter
Declassified/Released
US Department of State
EO Systematic Review
20 Mar 2014
Markings: Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014